Supreme Court, U.S.
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No. 01-548

IN THE

Supreme Court of the United States

SOCIETÀ COOPERATIVA L'ARCIERE,
Petitioner,

v.

TIMOTHY J. KOPKE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

RESPONDENT TIMOTHY J. KOPKE'S BRIEF IN OPPOSITION

CHRIS J. TREBATOSKI
Counsel of Record
DAVID A. KRUTZ
AMY V. KOSSORIS
MICHAEL BEST & FRIEDRICH LLP
100 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-6560

JOSEPH D. KEARNEY
Post Office Box 2145
Milwaukee, Wisconsin 53201
(414) 479-0006
Of Counsel

Counsel for Respondent Timothy J. Kopke

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION RESTATED

Whether the Wisconsin Supreme Court correctly applied the principles of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny to the facts and circumstances of this particular case?

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RESPONDENT TIMOTHY J. KOPKE'S BRIEF IN OPPOSITION

The Wisconsin Supreme Court upheld the Brown County Circuit Court's exercise of jurisdiction over petitioner Società Cooperativa L'Arciere ("L'Arciere") based on principles well-settled in the decisions of this Court. Specifically, the Court applied the minimum-contacts test as announced in the landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and as refined in a subsequent series of cases, the most notable of which here are *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). This fact-driven test has been routinely used for decades by both state and federal courts across the Nation, which have derived considerable uncontroversial law from these decisions.

Petitioner, however, suggests that the Court should use this case to reopen the debate between Justice O'Connor's and

Justice Brennan's views of the so-called "stream of commerce" test, as reflected in the subsequent case of *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). But the separate opinions in *Asahi* only departed from one another with regard to Justice O'Connor's view that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* at 112. More fundamentally, all members of the Court in *Asahi* recognized that questions of personal jurisdiction require the application of *International Shoe*'s principles in the context of particular factual disputes—and it is with this broader aspect of the modern constitutional law of personal jurisdiction that petitioner must ultimately quarrel.

In any event, this case does not even remotely resemble *Asahi*. Here, a severely injured Wisconsin citizen is suing a foreign defendant whose actions are alleged to have directly caused his injury. The case is indistinguishable in its essence from *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), or any of scores of other cases upholding long-arm jurisdiction. Indeed, even the dissent here, upon which the petitioner places so much reliance, was quite explicit that this case does not turn upon the competing views set forth by different members of this Court in *Asahi*. *See, e.g.*, Pet. App. 36, 43.

In these circumstances, the petition raises nothing more than a dispute over the application—in a particular case with peculiar facts—of well-settled principles of personal jurisdiction as established in *International Shoe* and refined in cases such as *World-Wide Volkswagen*. Petitioner's request that this Court review the facts of this case for the propriety of those principles' application should be denied; Kopke's action against petitioner and the other defendants should be permitted to go to trial, as scheduled, in June 2002.

COUNTERSTATEMENT OF THE CASE

The fact-driven nature of the *International Shoe* test and petitioner's inadequate and argumentative statement of the case require this counterstatement of the case. In order to place the petition in context, it is necessary to set forth (1) the underlying events and commencement of this action, (2) the basis for jurisdiction as established in discovery, (3) the proceedings in the state courts on petitioner's request for dismissal for lack of personal jurisdiction, and (4) the portion of this case currently pending in the Wisconsin Court of Appeals.

1. Underlying Events and Commencement of Action. Respondent Timothy J. Kopke ("Kopke") suffered a severe spinal cord injury and was rendered a permanent quadriplegic on May 28, 1997, when he opened the door of a freight container shipped to Wisconsin from Italy. The inadequately secured contents (a pallet loaded with paper) fell out of the freight container and struck Kopke. Kopke thereafter commenced this action, initially naming as defendants Cartiere Binda in Liquidazione, S.p.A. ("Binda"), the entity that manufactured and shipped the freight, and A. Hartrodt S.R.L. ("Hartrodt"), which was subsequently dismissed as a defendant.[1]

In its answer, Binda raised as an affirmative defense the allegation that L'Arciere (i.e., petitioner here)—and not Binda—was the entity that had loaded, packed, placed, and secured the materials in the freight container and that Kopke thus had failed to sue the responsible entity. Binda produced the contract between it and petitioner for the processing of Binda's product into shipping containers.

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[1] Hartrodt was dismissed without objection from any of the parties when it became clear that the shipping documents erroneously named Hartrodt as the shipper.

Kopke thereupon amended his complaint to add petitioner as a defendant.[2] The basis for Kopke's claim against petitioner is the allegation that petitioner improperly positioned the palletized product within the freight container and inadequately secured the product. Specifically, the bracing boards which petitioner installed to secure the cargo from tipping were of insufficient strength and size to retain the palletized cargo during transit to Wisconsin. Further, as alleged by Binda, the boards were weakened by severe hammering and damage during the course of installation by petitioner. The result was the collapse of the cargo onto Kopke.

2. Basis for Jurisdiction as Established in Discovery. After Kopke's complaint thus naming petitioner as an additional defendant was filed, the parties conducted discovery on the question of the circuit court's jurisdiction over petitioner and on the merits of Kopke's claim. The documents produced and depositions taken in this discovery more precisely established the nature of petitioner's relationship with Binda in general and its actions with respect to the specific events underlying this case.[3]

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[2] Subsequently, Binda filed a third-party complaint within this case against Riunione Adriatica di Sicurtà S.p.A. ("RAS"), its insurer, and Kopke then amended his complaint to add a claim against RAS, in accordance with Wisconsin procedure. Petitioner L'Arciere filed a cross-complaint against Binda for contribution and/or indemnification. All of these claims were filed as part of the Brown County Circuit Court case commenced by Kopke and bear No. 98-CV-996 in the trial court.

[3] No evidentiary hearing on jurisdiction was held here. Rather, petitioner moved to dismiss for lack of jurisdiction, although its motion relied on matters outside the pleadings and thus was in the nature of a summary judgment motion. *See Wisconsin Conf. Bd. v. Culver*, 243 Wis. 2d 394, 402, 627 N.W.2d 469, 474 (2001). In these circumstances, the evidence must be viewed in the light most favorable to Kopke, the non-moving party, and all reasonable inferences drawn in his favor. *See*

Binda and petitioner entered into an exclusive contract in 1995 under which petitioner supplied workers to load Binda's product (paper) into cargo containers and to secure the containers. This included product that Binda wished to ship to Wisconsin for delivery to CTI Paper USA, Inc. ("CTI"). CTI's and Binda's relationship was even more long-standing than Binda's and petitioner's, as CTI had been purchasing paper from Binda since 1991.

It is undisputed that, as part of its contract with Binda, petitioner loaded at least 45 containers for shipment to CTI in Wisconsin. Thirty-nine of these arrived during the period of November 1996 to May 1997, when Kopke was injured. It is not currently known how many more containers were packed by petitioner and shipped to Wisconsin: the documents identifying the 45 containers relate only to containers in which the cargo had shifted, tipped, or otherwise moved, causing damage to the cargo. This resulted in a report—"RECEIVING DAMAGE REPORT"—which CTI immediately faxed to Binda for each container with damaged cargo. The number of containers that did not result in damaged cargo is not reflected in any available documents.

Petitioner had specific duties with regard to the loading of containers for shipment. Petitioner's workers would follow loading plans separately prepared by Binda for each container and would move the pallets of paper into the cargo container. They would then secure the pallets using boards, bracing beams, and inflated air bags to fill side spaces. Petitioner would alert Binda concerning any problems it encountered in loading pallets.

Burkes v. Klauser, 185 Wis. 2d 308, 328, 517 N.W.2d 503, 511 (1998); *compare Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). This principle applies fully in the personal-jurisdiction context. *See, e.g., American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir. 1988).

The loading plans which Binda provided to petitioner clearly indicated that each of these containers was being shipped to CTI. For example, Binda produced in discovery loading plans for five of the shipments that occurred between November 1996 and May 1997. At the top of each of these plans are written such things as "Contenitore X CTI Neenah" and "Cont. X CTI Appleton." "Contenitore" (or as abbreviated "Cont.") is an Italian word meaning "container," and "X" is an abbreviation for "per," which means "to." Binda's witness testified at deposition that *every* loading plan for shipment of product to CTI contained notations identifying the product as being shipped to CTI and identified Wisconsin cities such as Neenah or Appleton.

Finally, it is undisputed that, as part of its contract with Binda, petitioner physically loaded and secured the product and the containers that caused Kopke's injuries.

3. Proceedings in Court on Petitioner's Request for Dismissal. a. On November 19, 1999, the Brown County Circuit Court (William M. Atkinson, J.) denied petitioner's motion to dismiss for lack of personal jurisdiction. The circuit court concluded that petitioner's activities were sufficient under both Wisconsin's long-arm statute and the requirements of due process to permit jurisdiction over petitioner in Wisconsin.

b. Petitioner thereupon requested interlocutory review in the Wisconsin appellate system of the circuit court's non-final order denying its motion to dismiss. The Wisconsin Court of Appeals granted petitioner's request and certified the case to the Wisconsin Supreme Court.

The Wisconsin Supreme Court affirmed. As an initial matter, the court concluded that Wisconsin's long-arm statute was satisfied. Specifically, the court considered the "local injury, foreign act" provision in Wisconsin law. This statute grants jurisdiction over any action involving an in-state injury "arising out of an act or omission outside this state by the

defendant," provided that "[p]roducts, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade." Wis. Stat. § 801.05(4)(b). Relying upon a Seventh Circuit decision interpreting Wisconsin law, the court concluded that the word "process[ing]" in the statute encompassed the concept of "'subjecting something to a particular system of handling to effect a particular result and preparing something for market or other commercial use by subjecting it to a process.'" Pet. App. 6-7 (quoting *Nelson by Carson v. Park Indus., Inc.*, 717 F.2d 1120, 1124 n.5 (7th Cir. 1983)). On this basis, the Wisconsin court held that petitioner's activities of loading, arranging, and securing Binda's paper constituted "processing" and brought petitioner within the long-arm statute. *See* Pet. App. 11-12.

The Wisconsin Supreme Court then held that this exercise of jurisdiction over petitioner was consistent with the Due Process Clause. The court inquired first whether petitioner had the requisite minimum contacts with Wisconsin. The court specifically relied on this Court's decisions in *World-Wide Volkswagen* and *Burger King*, highlighting the following statement by this Court:

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others. *The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Cf. Gray*

v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

World-Wide Volkswagen, 444 U.S. at 297-98, *quoted in* Pet. App. 16 (emphasis supplied here). The Wisconsin court acknowledged a disagreement in this Court's various opinions in the subsequent *Asahi* case over the precise scope of this stream-of-commerce basis for personal jurisdiction. While the state court preferred Justice Brennan's formulation in *Asahi*, *see* Pet. App. 19, it also noted that even Justice O'Connor's opinion indicated that foreseeability plays a role in personal-jurisdiction analysis under *World-Wide Volkswagen*, *see* Pet. App. 17. Ultimately, the Wisconsin Supreme Court determined to apply "the stream of commerce analysis of *Burger King* and *World-Wide Volkswagen*." Pet. App. 20.

The court then went about "applying that test to the present case." Pet. App. 21. This required a fact-intensive review of petitioner's actions. The court discussed the following at some length: (1) "the nature of the contractual relationship between [petitioner] and Binda," in which each company's "employees worked together . . . to load the cargo containers," and petitioner's alleged negligence "in the manner in which it loaded the cargo container, [thereby] caus[ing] or contribut[ing] to causing [Kopke's] injuries"; (2) "the loading instructions prepared by Binda and used by [petitioner] L'Arciere, [which] identified the container's destination as 'Neenah' or 'CTI Appleton,'" all of which meant that "these products did not arrive randomly or fortuitously in Wisconsin [but] were specifically intended to arrive in this forum"; and (3) "the damage reports prepared by CTI on cargo containers received from Binda between November 8, 1996, and May 20, 1997, [which] demonstrate that at least 40 containers were loaded by [petitioner's] workers for delivery in this forum." Pet. App. 21-22.

The court concluded the minimum-contacts analysis by explaining that petitioner benefited from the distribution of

Binda products in Wisconsin. *See* Pet. App. 22. More than that, "L'Arciere literally 'played a hand' in the product arriving in this state," and, indeed, its "handling of the final product is the alleged act of negligence that may have caused Kopke's injuries." *Id.* Based on all these circumstances, the Wisconsin Supreme Court found it "reasonable to conclude that the purposeful availment requirement is met and that L'Arciere has sufficient minimum contacts with this forum to be held accountable here if any negligence on its part in loading the cargo containers has resulted in damages." *Id.*

Having found that minimum contacts were established, the court turned next "to a consideration of the second inquiry for personal jurisdiction, application of the standard of fair play and substantial justice." Pet. App. 24. Looking to factors identified as relevant in *Asahi* and *World-Wide Volkswagen*, the Court found the first two factors to be strongly present here. First, "the State of Wisconsin has an unquestionable interest in providing its citizenry with a forum to adjudicate claims arising here" (unlike, say, in *Asahi*, where the remaining dispute was between two foreign nationals). Pet. App. 24. Second, "Kopke, who suffered a spinal cord injury causing permanent quadriplegia, has an undeniable interest in obtaining convenient relief." *Id.*

The third factor considered by the court—and the one it discussed at the greatest length—is "the burden on the defendant." Pet. App. 25; *see id.* at 25-28. The court squarely confronted petitioner's contention "that it would be unfair and unjust to exercise personal jurisdiction over a party that merely packs or loads goods onto a truck or vessel," as well as petitioner's "view [that] subjecting [it] to jurisdiction in this forum would subject all packing and portage companies, stevedores, and longshoremen to nationwide, even worldwide, jurisdiction." Pet. App. 25. The court explained that the latter was not the import of its decision and that several decisions relied on by petitioner below (which

were, in any event, decided on minimum-contacts as opposed to fundamental-fairness grounds) did not indicate an absence of jurisdiction here:

> In the case at hand, the cargo container's arrival in Wisconsin was not "merely fortuitous" as was the passage of goods through Miami in [a Florida case cited and discussed] or, arguably, the docking of a vessel in Seattle in [a Washington case]. The goods were purchased by CTI and intended for delivery in this forum; the goods did not fortuitously, randomly, or even erringly appear here. In contrast to the events in [a Minnesota case cited and discussed], this was not a one-time transaction. CTI had been purchasing Binda's products since 1991; [petitioner] L'Arciere was loading cargo containers under contract with Binda from 1996 through May of 1998. During this period, numerous cargo containers were packed by L'Arciere, destined for Wisconsin. Thus, we conclude that L'Arciere was not an anonymous entity packing goods for shipment somewhere in the global economy.

Pet. App. 27-28. The court thus concluded that, in order to be successful within the context of this case, petitioner's argument necessarily reduced to a contention that "a nonresident, unconsenting business entity engaged in loading or stowing goods will always avoid personal jurisdiction because it is unfair or unreasonable." Pet. App. 28. The court "decline[d] to adopt [such a] 'per se' analysis offered by L'Arciere." *Id.*

Finally, the court rejected petitioner's attempt to fit this case within the facts of *Asahi*. The court explained that one important feature "distinguish[ing] *Asahi* from the case at hand is that in *Asahi*, the injured plaintiff, a California resident, was no longer a part of the action, having reached a settlement agreement." *Id.* Here, by contrast, "Kopke [a Wisconsin resident] is still a party, and very interested." Pet.

App. 28-29. The court further explained that *Asahi* is "substantially different from the present case" in other important details as well, in particular in that the present case does not involve a "sale of goods scenario" analogous to *Asahi*, where the Court rejected personal jurisdiction over a foreign national that had sold its product to another foreign national that subsequently incorporated that product into a product that was sold in California. Pet. App. 29.

c. Justice Crooks, joined by two other justices, dissented.[4] He took issue "particularly" with a statement early in the majority's personal-jurisdiction analysis that "'compliance with the long-arm statute *presumes* that due process is met.'" Pet. App. 30 (quoting Pet. App. 13, which itself cites *Lincoln v. Seawright*, 104 Wis. 2d 4, 10, 310 N.W.2d 596, 599 (1981)) (emphasis added by dissent). Justice Crooks found such a presumption to be "a grievous error that should not be continued." Pet. App. 31.

Second, Justice Crooks considered the state of the purposeful-availment requirement, recounting the difference between Justice O'Connor's and Justice Brennan's views. Pet. App. 32-33; *see supra* p. 8. The dissenting justice noted the majority's preference for Justice Brennan's formulation, but stated that his view here did not turn on which *Asahi* formulation was selected. Rather, according to the dissent, it was enough to preclude jurisdiction (under any view of *Asahi*) that there was no explicit evidence that petitioner "knew specifically that some [shipments it packed] were destined for Wisconsin." Pet. App. 36. Of course, shipments were marked with such things as "Cont. X CTI Appleton"

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[4] A separate dissent of the same justices concerned the meaning of Wisconsin's long-arm statute, *see* Pet. App. 43-45, and thus is not implicated here.

and "Contenitore X CTI Neenah," to which fact the dissent responded thus:

> There are no less [*sic*] than three Neenahs in the United States (one apiece in Alabama, Virginia, and Wisconsin); two dozens Appletons within and without the United States; and literally hundreds of locations around the world where one may find corporations in whose name the letters "CTI" play a prominent part.

Pet. App. 37. The dissent acknowledged a series of cases where courts had found that defendants could be presumed to know the destination of products; these include *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994), where the court upheld jurisdiction in Nebraska over a Japanese fireworks company that did not itself ship its products to or distribute them in the state, *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980), which sustained jurisdiction on the grounds that the defendant should have known that its products would be marketed and sold in the forum state, and *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660 (7th Cir. 1986), where jurisdiction was permitted in Wisconsin over a Missouri defendant that was part of a distribution network. *See* Pet. App. 37-39 & n.5. The dissent sought to distinguish this line of cases on the ground that in the instant case, as the dissent saw it, nothing would have given petitioner "reason to believe that . . . the paper it packed would end up in Wisconsin [i.e., a specific state]." Pet. App. 39.

Finally, the dissent concluded that "the majority is creating a minimum contacts test based upon foreseeability"—an "approach [that] was plainly rejected by the United States Supreme Court in *World-Wide Volkswagen*." Pet. App. 41. The dissent noted that "[t]here, the Court held that jurisdiction in Oklahoma cannot be based upon 'the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident

while passing through Oklahoma . . . .'" *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 295). The dissent contended that this case was similar. *See* Pet. App. 41-42.

4. Related Aspects of this Case Pending in the Wisconsin Court System. As previously noted, this action in the Brown County Circuit Court has occasioned, among other things, a third-party complaint by Binda impleading RAS, its insurer, into this case. *See supra* p. 4 n.2. Because RAS has sought to support the petition for certiorari "[g]iven [its] potential" to assist RAS in the portion of this case still pending in the Wisconsin appellate system (RAS Brief in Support, p. 1), it is appropriate to recount the procedural history and current status of the Binda-RAS dispute.

Binda's third-party complaint against RAS seeks a ruling concerning its insurance coverage for any liability that it may have to Kopke. RAS moved to dismiss Binda's third-party complaint based on, among other things, lack of personal jurisdiction over RAS in Wisconsin. Following discovery, Judge Atkinson concluded in the fall of 2000 that there was no personal jurisdiction over RAS in Wisconsin and accordingly granted RAS's motion to dismiss Binda's third-party complaint. Binda filed an appeal of this decision in the Wisconsin system. That appeal (*Kopke v. A. Hartrodt S.R.L.*, Wis. App. No. 00-3008) is currently pending in the Wisconsin Court of Appeals, District III.

REASONS FOR DENYING THE PETITION

The Wisconsin Supreme Court applied this Court's long-standing personal-jurisdiction precedents—most notable among which for this case is *World-Wide Volkswagen, Inc. v. Woodson*, 444 U.S. 286 (1980)—in deciding that it is constitutionally permissible for petitioner to be subject to civil process in this action. These cases establish that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation

that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98. Petitioner here essentially stands in the shoes of such a corporation: (1) While it did not own the products in question, it played an indispensable and ultimate role in delivering them into the stream of commerce—i.e., in loading, arranging, and "securing" (the last term must be used loosely, given what happened to Kopke) Binda's paper in the shipments to Wisconsin; (2) It performed this role as part of a long-term and exclusive contract with Binda; and (3) It acted pursuant to plans (and in a context, *viz.*, shipping) that gave it notice that the purpose of its activities was to serve as a final step in enabling the products in question to be shipped to CTI in such places as "Appleton" and "Neenah."

In this legal and factual context, petitioner does not specify the rule of law it seeks applied to this case. To the extent that (as the Wisconsin Supreme Court suggested) petitioner seeks a per se rule—such as one that would proscribe jurisdiction under the stream-of-commerce approach unless the forum state's name was squarely marked on shipments (e.g., "Appleton, Wisconsin" rather than just "Appleton") or perhaps even proscribe jurisdiction over anyone but the *owner* of a product being delivered into the stream of commerce—it is sufficient to note that no such per se rule can be maintained under the multifactor test that dominates the modern constitutional law of personal jurisdiction. To the extent that petitioner does not wish any such per se rule—and is merely seeking examination of the Wisconsin Supreme Court's application of existing *International Shoe* factors to this particular case—that request does not warrant this Court's review. Thus, in either event, the petition should be denied.

I. CONTRARY TO PETITIONER'S CLAIM OF "SUBSTANTIAL CONFUSION," THE TEST APPLIED HERE DERIVES FROM *INTERNATIONAL SHOE*, WAS SPECIFICALLY RECOGNIZED AND SANCTIONED IN *WORLD-WIDE VOLKSWAGEN*, AND IS ROUTINELY APPLIED IN OTHER CASES, ACCORDING TO THE FACTS OF EACH.

The basic constitutional contours of personal jurisdiction are well-established in the precedents of this Court. The essential element is that a defendant may be the subject of civil process in a state if it has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). As this Court has repeatedly recognized, this test requires consideration of the facts and context of each individual case. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). The *International Shoe* test thus repudiates the formalistic requirements that previously made up the constitutional law of personal jurisdiction,[5] *see Pennoyer v. Neff*, 95 U.S. 714 (1877), and it does so for reasons identified by this Court:

> As technological progress has increased the flow of commerce between the States, the need for jurisdiction

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[5] This is true except perhaps in the narrow context of in-state service. *See Burnham v. Superior Ct.*, 495 U.S. 604, 607 (1990) (opinion of Scalia, J.) (in-state service necessarily suffices for personal jurisdiction and in that context no multifactor balancing test is required). *But cf. id.* at 629 (opinion of Brennan, J.) ("'*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny'") (quoting *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977)).

> over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714, to the flexible standard of *International Shoe Co. v. Washington*, 326 U.S. 310.

Hanson v. Denckla, 357 U.S. 235, 250-51 (1958).

The Wisconsin Supreme Court here did nothing other than apply the *International Shoe* test to the facts of this particular dispute. Nor was it left to do so without direction about how such application should play out in the context of a corporation whose contact with the forum state is that products that the corporation sent into the stream of commerce have reached the state. At least since the famous case of *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), courts have confronted the question of how to apply the *International Shoe* test in a modern economy where products manufactured in one forum are then shipped to another forum. Courts have thus articulated the so-called stream-of-commerce doctrine, which has not only general grounding in *International Shoe* but specific roots in subsequent decisions of this Court.[6] This Court specifically approved this line of cases in *World-Wide Volkswagen*, stating that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into

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[6] *See Gray*, 22 Ill. 2d at 439, 176 N.E.2d at 764 (discussing and quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957), which though not itself a stream-of-commerce case recognized that, while "defendant had no office or agent in California nor did it solicit any business there apart from the policy sued on . . . , 'it is sufficient for purposes of due process that the suit was based on a *contract* which had substantial connection' with California") (emphasis added by *Gray* court).

the stream of commerce with the expectation that they will be purchased by consumers in the forum State." 422 U.S. at 297-98 (citing *Gray*).

Viewed against this backdrop, the Wisconsin Supreme Court's decision is properly seen as a particular application of long-standing constitutional principles to the facts and circumstances of petitioner's actions here. That of course is the reason that these matters are recounted above in some detail. *See supra* pp. 3-6, 8-11. While it is therefore not necessary to recount those facts and circumstances in similar detail again, it should be noted that they include the following: First, petitioner played an indispensable and ultimate role in effecting the delivery of the products in this case not merely into the stream of commerce but into the forum state. Petitioner loaded, arranged, and "secured" the paper in the pallets in order for the product thereupon to be shipped immediately and directly to Wisconsin. Second, the product's arrival in the forum state was not some fortuitous or random event: petitioner undertook the actions that allegedly resulted in Kopke's severe injuries (and thus form the basis of this action) as part of a long-term and exclusive contract with Binda. Thus petitioner previously had similarly processed more than 40 other such deliveries to Wisconsin—and that number includes only those deliveries as to which the recipient registered a complaint because they arrived in Wisconsin in damaged condition. Third, petitioner worked directly with the owner of the product, Binda, and did so pursuant to written plans and in a context (that of shipping) that gave petitioner explicit notice that it was processing product for immediate delivery to "CTI" in "Appleton" and "Neenah."

To be sure, the specific facts of this case are not precisely those of *World-Wide Volkswagen* or *Burger King*—any more than those of *World-Wide Volkswagen* or *Burger King* were precisely those of *Gray*, or those of *Gray* were precisely those

of *McGee*, *see supra* p. 16 n.6, or those of *McGee* were precisely those of *International Shoe*. For example, petitioner did not own the products in question, as did the entities in question in various other cases, but rather was a contractor working alongside the owner (Binda). But ownership of products has never been suggested to be a *sine qua non* of personal jurisdiction.[7] What matters rather is the "quality and nature" of petitioner's actions, *Burger King Corp.*, 471 U.S. at 486, and it is upon these matters that the Wisconsin Supreme Court properly focused. This ability to accommodate new fact scenarios is among the values of the *International Shoe* test—it permits a flexible, fact-driven analysis of personal-jurisdiction questions. And surely it is *this* quality of existing doctrine—and not some refusal to provide guidance, as petitioner repeatedly suggests, *see* Pet. 5-6, 10, 18—that has guided the extent of the Court's *International Shoe* docket.

Given the contextual inquiry required under *International Shoe* and engaged in by the Wisconsin Supreme Court here, it is not surprising that there was a difference of opinion in the Wisconsin Supreme Court over application of the test to the particular facts here (after all, even *World-Wide Volkswagen* prompted a dissent, *see* 422 U.S. at 299 (Brennan, J., dissenting)) or even that the dissenting justices below called for this case to be reviewed by this Court. Absolute certainty of result, to be sure, is not the hallmark of balancing tests (and it would be the rare judge who lost a debate about a particular application of a balancing test and did not want the decision reviewed). But unless this Court wishes to revisit *International Shoe*'s basic teaching that a defendant may be

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[7] This is especially so because in economic terms the distinction frequently has no substance. *See* Frank Easterbrook & Richard Posner, *Antitrust* 869 (2d ed. 1981) ("anything that can be accomplished by ownership" of two firms "also can be accomplished by a properly drawn contract" between the two firms).

subject to process in a state if it has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,'" 326 U.S. at 316, the occasional disagreement in application of the *International Shoe* test to particular facts is inevitable and does not warrant this Court's review.

Nor does this case present some fundamental question about rival formulations of the stream-of-commerce doctrine as set forth in *Asahi*, as petitioner suggests. *See* Pet. 6-13. As even the dissent recognized here, *see supra* pp. 2, 11, the proper result in this case does not turn on the difference of opinion in *Asahi* between Justice O'Connor, who would require something more than "a defendant's mere awareness that the stream of commerce 'may or will sweep the product into the forum State,'" Pet. 9 (quoting 480 U.S. at 112), and Justice Brennan, who required "no showing of 'additional conduct'" provided that "a [defendant] is aware that the final product is being marketed in the forum State," *id.* (quoting 480 U.S. at 117). This is the case for two reasons.

First, as a factual matter here (and one that is dispositive of petitioner's argument), this case does not involve "mere awareness" on petitioner's part about where the "stream of commerce" may or might "sweep" the container. It involves at least constructive knowledge—a concept well-recognized in the caselaw, as reflected in both the majority (*see* Pet. App. 23-24) and dissenting (*see supra* p. 12) opinions here [8]—of

[8] *See, e.g.*, *Barone*, 25 F.3d at 613 n.4 ("The traditional equivalence between 'know' and 'should have known' in our jurisprudence suggests that, for purposes relevant to this case, it is a distinction that makes no difference. The ultimate test of in personam jurisdiction is 'reasonableness' and 'fairness' and 'traditional notions of fair play and substantial justice' [citation omitted]. In applying such a test, it is a matter of common sense that there should be no distinction between 'know' and 'should have known.' We cannot say that a potential defendant who

the *immediate* destination of the pallets that petitioner and Binda together were packing (as opposed to say, some destination to which someone in Wisconsin might himself forward the product) *and further* involves conduct, already recounted, designed to be a final act in effecting such a result. Thus, under either Justice O'Connor's or Justice Brennan's view in *Asahi*, personal jurisdiction over petitioner is permissible.

Second, as a legal matter, and as stated in yet another opinion in *Asahi*, it is not clear that it is possible to draw an "unwavering line" between "'mere awareness' that a component will find its way into the forum State and 'purposeful availment' of the forum's market." *Asahi*, 480 U.S. at 122 (Stevens, J., concurring). For this reason, it is not surprising that, in petitioner's words, "state court decisions which grapple with the stream of commerce doctrine [are] difficult to summarize" (Pet. 10) or that "the majority" of courts "have declined to adopt any specific formulation, choosing to resolve each case 'on the facts,'" and have thus been able to "avoi[d] choosing" between Justice O'Connor's and Justice Brennan's formulations (Pet. 10-11). In addition (and again in petitioner's words), among the "[v]arious conceptual solutions [that] have been proposed" in numerous law review articles, there has emerged "no consensus" as to some preferable alternative to existing law. Pet. 12. In short, while it is appropriate for academics to "call for international

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actually knows his products will ultimately reach the forum state any more 'purposefully avails itself of the privilege of conducting activities [there]', [citation omitted], than a potential defendant who merely *should have known*.") (quoting *Oswalt*, 616 F.2d at 200-01). Even the dissent below did not question this analysis in *Barone*, *compare* Pet. App. 23 (majority's discussion of case) *with* Pet. App. 37-38 (dissent's discussion), although it attempted to argue that *Barone* was "inapposite" (Pet. 37) and involved a type of constructive knowledge that was somehow different from that here, *see* Pet. 39.

standards," to "propos[e] legislative solution[s]," and to "analyz[e] jurisdiction under liberal and communitarian approaches" (Pet. 12), this scarcely demonstrates that a "chaotic patchwork of approaches to personal jurisdiction" is applied *by the courts*, as petitioner maintains (Pet. 13). Rather, courts have found adequate guidance in the basic prescriptions set forth in *International Shoe* and its progeny to enable them to engage in the fact-specific inquiry required in modern personal-jurisdiction law. Petitioner's disagreement with the result of that inquiry in this particular case does not mean that the Wisconsin Supreme Court's contextual application of this Court's precedents warrants review by this Court.

II. PETITIONER'S OTHER CRITICISMS OF THE DECISION BELOW DO NOT JUSTIFY REVIEW.

Petitioner maintains as separate arguments that the Wisconsin Supreme Court's decision should be reviewed because it sanctioned jurisdiction based on "mere foreseeability that products handled by defendants would make their way into the forum state" (Pet. 13-16) and that review is important to ensure "stable international relations" and to protect "our citizens" from "foreign courts" (Pet. 16-18).[9]

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[9] Petitioner properly places no reliance on the point that most animated the dissent in this case—*viz.*, the "majority['s] state[ment] that 'compliance with the [long-arm] statute *presumes* that due process is met.'" Pet. App. 30 (Crooks, J., dissenting) (quoting Pet. App. 13) (emphasis in dissent). This is so for two reasons. First, notwithstanding this statement, the court's opinion does not rely on this (or any other) presumption in its analysis, instead finding, for example, that "Kopke has met his burden to establish . . . personal jurisdiction over [petitioner]." Pet. App. 24. Second, and more fundamentally, notwithstanding the dissent's believing the majority's statement to be "grievous error" (Pet. App. 31), it is in fact an unremarkable context-specific recognition of the fact that the Wisconsin legislature should be *presumed* to have written

The former contention is simply false, as demonstrated in the foregoing section. In fact, the Wisconsin Supreme Court engaged in a fact-intensive scrutiny of the nature and extent of petitioner's contacts with Wisconsin and concluded, for the variety of reasons explained above, that this was not a case where a defendant's contact with the forum state was merely that the defendant should have been able to foresee that a product with which it was associated might someday arrive there. *See supra* pp. 8-11, 14, 17 (recounting and analyzing petitioner's contacts with Wisconsin as summarized by the Wisconsin Supreme Court). In these circumstances, it is not necessary to reiterate that explanation here. It should nonetheless be noted that petitioner has correctly decided not to repeat its overreaching argument that "subjecting [petitioner] to jurisdiction in this forum would subject all packing and portage companies, stevedores, and longshoremen to nationwide, even worldwide, jurisdiction." Pet. App. 25. As the Wisconsin Supreme Court's analysis demonstrates, this case establishes only that a processing company such as petitioner, with a long-term exclusive contract with a manufacturer and shipper such as Binda that requires the company to work alongside that other entity and

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a constitutional long-arm statute, just as other statutes are presumed constitutional.

Respondent RAS's essay (RAS Brief in Support, pp. 13-16) concerning the "real" reason Kopke wishes to maintain this action against petitioner also warrants brief comment. Kopke amended his complaint to add petitioner as a defendant when Binda denied responsibility for Kopke's injury. *See supra* pp. 3-4. Kopke can scarcely be criticized for "want[ing] to keep . . . in this case" (RAS Brief in Support, p. 16) the entity that RAS's insured has blamed for rendering Kopke a quadriplegic. RAS's essay loses sight of two matters: first, that recovery for injured persons from legally responsible entities is the purpose of the substantive law of torts, and second, that pleading in the alternative is an acceptable mode of procedure, *see, e.g.*, Wis. Stat. § 802.05(b); Fed. R. Civ. P 8(e)(2).

to engage in repeated acts of packaging and processing materials about to be shipped immediately and directly to the same forum (whose cities are marked on the loading instructions), may be made to answer in that forum for its alleged torts in connection with one of its acts. This is not "mere foreseeability," as petitioner maintains (Pet. 13); nor is it, as the dissent maintains, analogous to the situation proscribed in *World-Wide Volkswagen*—i.e., "'the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.'" Pet. App. 41 (quoting 444 U.S. at 295).

As for the latter contention, that concerning comity and international relations, petitioner fails adequately to appreciate that the inquiry into whether personal jurisdiction is "reasonable" in a particular case, as mandated by this Court, *see Asahi*, 480 U.S. at 113; *World-Wide Volkswagen*, 444 U.S. at 292, provides ample basis for the courts of this Nation to eschew exercises of jurisdiction where doing so is necessary for "stable international relations" (Pet. 16), provided that this interest is not outweighed by others in the balancing test that any reasonableness inquiry requires.[10]

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[10] Petitioner L'Arciere's assertion (Pet. 17) that it is necessary to reject jurisdiction in this case to protect "our citizens" from foreign courts overlooks two basic principles. The first (a policy principle) is that, to the extent that American citizens have caused injuries in other nations, the United States has no interest in frustrating efforts to hold them accountable. The second (a legal principle) is that ample protection from overreaching against American citizens can be found in the basic guarantee afforded to its citizens by every State in this Nation (and applicable in federal court as well, *see* Fed. R. Civ. P. 69(a)) against the enforcement of foreign judgments that do not comport with essential elements of due process. *See generally* Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 Brooklyn J. Int'l L. 167, 173-78 (1998) (summarizing existing statutory and common law on enforcement of foreign judgments).

In these circumstances, petitioner's request for "coherent principles" (Pet. 17) is somewhat elusive, as petitioner offers no hint as to what these principles might be or under what circumstances they should trump the long-standing *International Shoe* framework. Thus, unless petitioner is seeking some per se exclusion from personal jurisdiction for foreign companies, the answer here, too, must be that this Court's precedents already afford the opportunity for thorough consideration of all the facts and circumstances of each defendant's contacts with the forum state—including the defendant's status, in appropriate cases, as a foreign entity. More than this, the Due Process Clause has not been thought to require since the *International Shoe* decision in 1945.

CONCLUSION

The petition should be denied and Kopke's action should be permitted to go to trial, as scheduled, on June 17, 2002.

Respectfully submitted,

CHRIS J. TREBATOSKI
Counsel of Record
DAVID A. KRUTZ
AMY V. KOSSORIS
MICHAEL BEST & FRIEDRICH LLP
100 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-6560

JOSEPH D. KEARNEY
Post Office Box 2145
Milwaukee, Wisconsin 53201
(414) 479-0006
Of Counsel

Counsel for Respondent
Timothy J. Kopke